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Supreme Court, U.S.
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No. 99-1536

IN THE

Supreme Court of the United States

D.H.L. ASSOCIATES, INC.,

Petitioner,

v.

JOHN O'GORMAN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

RICHARD BOWEN
Counsel of Record
JONATHAN M. SILVERSTEIN
KOPELMAN AND PAIGE, P.C.
Attorneys for Respondents
31 St. James Avenue
Boston, MA 02116
(617) 556-0007

159121

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

4/00

QUESTIONS PRESENTED

1. Whether the Court of Appeals properly declined to disturb the District Court's discretionary decision to deny plaintiff's request for certification.

   a. Whether the Court of Appeals properly determined that there exist no dispositive or unsettled questions of state law warranting certification.

   b. Whether the plaintiff's request for certification comprised an improper attempt to manipulate the federal courts' jurisdiction to insulate from review by the federal judiciary state court interpretations of federal constitutional provisions favorable to the plaintiff.

2. Whether the Court of Appeals appropriately applied the standard for review of adult entertainment zoning regulations set forth by this Court in *Renton v. Playtime Theatres, Inc.*, and whether such application was consistent with the holdings of other circuits.

   a. Whether the Court of Appeals properly affirmed the District Court's determination that the subject zoning By-law satisfied the "substantial government interest" test, in that it was designed to combat the adverse secondary effects commonly associated with adult entertainment.

   b. Whether the Court of Appeals properly affirmed the District Court's determination that the subject zoning By-law provides for a reasonable opportunity for adult entertainment establishments to open and operate.

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STATUTORY PROVISIONS INVOLVED

In addition to constitutional provisions and statutes referenced by the petitioner, this case involves statutes of the United States, 42 U.S.C. §§ 1983 and 1988(b), and the Commonwealth of Massachusetts, Mass. Gen. L. ch. 12, Sections 11H and 11I, the complete texts of which are set forth in the Appendix to this brief.

STATEMENT OF THE CASE

A. Procedural History

By this action, DHL seeks to invalidate a duly-promulgated zoning By-law enacted by the Town of Tyngsborough ("the Town") to regulate the time, place and manner of sexually-oriented business activities ("the By-law"). DHL further seeks to compel the issuance of a sexually-oriented entertainment license for an establishment owned and operated by DHL, known as "Mathew's."

The Complaint was originally filed in the Massachusetts Superior Court for Middlesex County, and the defendants removed the action to the United States District Court for the District of Massachusetts. In its zeal to paint this case as one primarily concerning questions of state law, DHL asserts that the Complaint "raised state statutory and constitutional violations, as well as a single count under 42 U.S.C. § 1983." (Petition for Writ of Certiorari [hereinafter "Petition"], p.2). What DHL neglects to mention is that, in addition to the count under 42 U.S.C. § 1983, the Complaint also contains three separate counts alleging violations of DHL's rights under the United States Constitution as well as the Massachusetts Declaration of Rights. (First Circuit Appendix [hereinafter

"A.__"], 20-22). Therefore, four of the eight counts in the Complaint state federal questions.[1]

Contrary to DHL's assertion that, "[a]fter removal, the petitioner filed motions to remand or certify the state constitutional issues to the state courts" (Petition, p.8), DHL actually waited over three years before filing any such motion. During this period the parties proceeded with the litigation of this case in the District Court, and DHL neither objected to the District Court's retention of jurisdiction, nor moved to have the case or any portion thereof remanded or certified to the state courts. Likewise, at no time during this period, did DHL attempt to characterize the protections invoked under the Massachusetts Declaration of Rights as separate from or broader in scope than the protections afforded under the First Amendment to the United States Constitution. Not coincidentally, when DHL did move for remand and certification on November 12, 1997, *over three years* after the initiation of this litigation, it did so only after the District Court had, on October 3, 1997, issued summary judgment rulings adverse to DHL. (*See* A. 7, 510-540). The District Court denied DHL's motions for remand and certification, as well as several subsequent motions for remand, certification and abstention.

After a three-day bench trial, the District Court found in favor of the Town and entered judgment dismissing all of DHL's

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1. DHL agreed prior to trial that one of the state law counts, the "Fourth Cause of Action," was precluded by the findings of the state Superior Court's decision in a related license suspension case. The first three counts all concerned state law licensing claims which must be deemed subsidiary to the constitutionality of the By-law, in that DHL could not legally exercise any license in derogation of a valid zoning by-law. *Lincoln v. Giles*, 317 Mass. 185, 57 N.E.2d 554 (1944). Each of the last four counts of the Complaint raises federal questions.

federal claims, and remanding the remaining state-law claims to the state Superior Court, 6 F. Supp.2d 70 (1998) (Petitioner's App. 27a-55a). On appeal, the Court of Appeals for the First Circuit affirmed the District Court's judgment, 199 F.3d 50 (1999) (Petitioner's App. 1a-26a).

B. The Record Below

Tyngsborough is a small, rural Town in northern Massachusetts, located approximately 40 miles north of Boston, on the New Hampshire border. The Town's population is approximately 9,500 people. (Petitioner's App. 3a, 30a). The Town has no downtown area, other than a small general store, town hall, tea room, doctor's office and fire station, and its business areas all immediately abut residential areas. (A.858). As both the District Court and Court of Appeals found, "Tyngsborough is a rural town in which the total acreage in the only commercial district that could properly be identified as the principal business district occupies very little of Tyngsborough's total acreage." (Petitioner's App. 23a, 44a).

Historically, the Town has played host to clubs which feature adult entertainment. A. 916. Pub 30 Something, a club which featured adult entertainment, offered adult entertainment for more than 20 years within the Town. (A. 916). An establishment called the Blue Moon has been licensed to offer adult entertainment for at least 15 years, and the Bell Ringer has offered adult entertainment, on at least one occasion. (A. 916). Moreover, Donato DiRocco, a principal of DHL, operated an adult entertainment business called the Tyngsborough Social Club from 1967 to 1992. (A. 642-43). It has been the Town's experience that clubs which offer adult entertainment generate a greater number of calls to the police than clubs that do not offer such entertainment. (A. 867, 947).

On February 10, 1994, Tyngsborough police discovered that DHL was offering nude dancing at its establishment known as "Bogies" (later known as "Mathews"), in violation of its live entertainment license. (A. 632). The Town's Board of Selectmen held a violation hearing and suspended DHL's liquor license for two days, which suspension was ultimately affirmed by the Massachusetts Superior Court. (A. 632, 643, 883).

Due to the illegal, unlicensed offering of sexually-oriented dancing by DHL and Pub 30 Something, a lead story in the *Boston Globe* declared that the Town, "an otherwise quiet suburb of 8,500," had more strip clubs in operation than Boston's Combat Zone. (A. 632, 643). This unwanted attention from major news media contributed to a tremendous public reaction to the illegal presentation of sexually-oriented entertainment by DHL and Pub 30 Something. (A. 868). Members of the Board of Selectmen received numerous telephone calls from residents concerned about the uncontrolled and unlicensed presentation of sexually-oriented entertainment resulting in an increase in crime. (Petitioner's App. 17a-19a, 39a-40a).

Upon receipt of the citizens' concerns, the Board of Selectmen instructed the town administrator and special counsel to "gather information about how other localities addressed adult entertainment and secondary effects issues." (Petitioner's App. 17a). Subsequently, on February 14, 1994, the Board of Selectmen held a public hearing to discuss the regulation of adult entertainment. (Petitioner's App. 31a). Approximately 75 citizens attended this meeting and expressed their concerns regarding the uncontrolled presentation of adult entertainment and the potential for an increase in crime. (A. 874-75, 887).

The Town held a Special Town Meeting on March 29, 1994. (A. 636-37). At this meeting, the Town unanimously voted to revise its zoning By-laws, by creating a new adult entertainment zone, comprising approximately 7.88 acres, and located in a commercial area with easy access to Route 3, a major interstate highway ("the 1994 zone"). (A. 636-37). DHL never applied for a permit to operate in this zone. (Petitioner's App. 82a, ¶47).

At its annual Town Meeting in May 1996, the Town voted to replace the 1994 zone with a *larger* zone, containing approximately 10.4 acres ("the 1996 zone").[2] (Petitioner's App. 5a). The 1996 zone is located within a commercially and industrially zoned area known as Applewood Commercial Park, which consists of five parcels located off of Route 3, a major interstate highway. (Petitioner's App. 5a, 83a-84a). Underground utilities are available to all lots in the 1996 zone, and all five lots are physically capable of hosting, at a minimum, a 15,000 square-foot building, with the exception of Lot 14, which could host an 8,000 square-foot building, which is approximately the same size as DHL's Mathew's. (A. 775, 779, 951). DHL has never made an offer to purchase or lease property located in the 1996 zone. (A. 787). Indeed, DHL has never even applied to operate in this zone. (A. 641).

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2. Although DHL originally challenged the validity of the 1994 zone as well as the 1996 zone, both the District Court and the Court of Appeals determined the validity of the 1994 zone to be moot. (Petitioner's App. 8a, 41a). DHL's Petition does not challenge the lower courts' determinations in this regard, and its challenge to the 1994 zone must, therefore, be deemed waived.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS PROPERLY DECLINED TO DISTURB THE DISTRICT COURT'S DISCRETIONARY DECISION TO DENY PLAINTIFF'S REQUEST FOR CERTIFICATION AND ITS DECISION IN THIS REGARD DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR ANY OTHER CIRCUIT.

A. There exist no novel, unsettled or dispositive questions of state law warranting certification and disposition of the plainly-stated federal claims was entirely consistent with decisions of this Court.

1. There exist no novel and unsettled questions of state law.

DHL incorrectly argues that certification was required because article 16 of the Massachusetts Declaration of Rights affords adult entertainment establishments broader protections from zoning restrictions than does the First Amendment. Massachusetts courts have had ample opportunity to identify such broader protections since this Court's decision in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), but have chosen not to do so. Instead, Massachusetts courts have chosen to apply *Renton* to cases involving article 16 claims, including those relied upon by DHL, thereby indicating its view that, in the context of zoning restrictions on adult entertainment, article 16 is coextensive with the First Amendment.

DHL relies primarily on two Massachusetts Supreme Judicial Court cases for the proposition that article 16 may be

broader in its protections of adult entertainment than is the First Amendment: *A.F.M., Ltd. v. City of Medford*, 428 Mass. 1020, 704 N.E.2d 184 (1999), and *T&D Video v. City of Revere*, 423 Mass. 577, 670 N.E.2d 162 (1996). As discussed below, each case involved challenges to local zoning restrictions under both article 16 and the First Amendment, yet in each case, the Massachusetts Supreme Judicial Court professed to apply the federal standard under *Renton* to all claims.

a. *A.F.M., Ltd. v. City of Medford*

DHL's characterization of *A.F.M.* as a decision under the Massachusetts Declaration of Rights is incorrect. The *A.F.M.* decision contains *not one reference* to the state constitution. Further, *A.F.M.* explicitly purports to be decided under this Court's interpretation of the *federal* Constitution in *Renton*, and the decision cites only federal First Amendment cases as authority.

In addition, *A.F.M.* does not even stand for the proposition for which it is cited by DHL. DHL erroneously states that the *A.F.M.* court "held the regulatory scheme [there at issue] unreasonably foreclosed avenues of communication" based upon a finding that the challenged adult zone provided for only .11 percent of the city's developable land. (Petition, p.7). In fact, the Supreme Judicial Court did not rule on the ultimate constitutionality of the subject ordinance, but simply upheld a preliminary injunction because the defendant city did not, at the preliminary injunction stage, "present any information explaining why it was reasonable to restrict adult businesses to such a minuscule portion of the developable land in the city." *A.F.M.*, 428 Mass. at 1021, 704 N.E.2d at 186.

Unlike the defendant city in *A.F.M.*, the Town has, in the instant matter, provided abundant evidence in support of the reasonableness of its 1996 zone, including the rural character of the Town, its location and population, the relatively small area available for commercial uses in general, and the fact that a pre-existing adult entertainment establishment is already located in the Town. Based upon this record, both the District Court and the Court of Appeals held that the 1996 zone does indeed provide adequate opportunity for adult businesses to locate in the Town. (Petitioner's App. 22a-25a, 44a -47a).

DHL begs the question when it states, "if *A.F.M., Ltd.* sets forth state constitutional considerations and is not simply wrongly decided under the first Amendment, the percentage of land [available in the 1996 zone] is greatly important." The state Supreme Judicial Court's decision evinces exclusive reliance in *A.F.M.* upon federal jurisprudence, primarily *Renton*. Surely, the state court would not exclusively apply the First Amendment test if it considered article 16 to be in any way broader than the First Amendment in its protection of adult entertainment from local zoning restrictions. The simple fact that the Supreme Judicial Court may have misapplied federal law does not suggest otherwise.

b. *T&D Video v. City of Revere*

DHL also contends that the Supreme Judicial Court's decision in *T&D Video v. City of Revere*, 423 Mass. 577, 670 N.E.2d 162 (1996), suggests that article 16 may provide adult entertainment with greater protections from zoning restrictions than the First Amendment. As it did with regard to *A.F.M.*, DHL has mischaracterized the unambiguous basis for the Supreme Judicial Court's holding in *T&D Video*.

In *T&D Video*, as in *A.F.M.*, the state court based its decision solely on First Amendment grounds, beginning its analysis by characterizing the case as "a First Amendment challenge," even though the plaintiff had also pled its claim under article 16. *T&D Video*, 423 Mass. at 580, 670 N.E.2d at 165. *T&D Video* discusses four federal cases, citing *not one* state case, and relying heavily on and purporting to clarify *Renton*. *See* 423 Mass. at 580-82, 670 N.E.2d at 165-66. In its two-page analysis of the constitutional question presented, the Court discusses and relies exclusively upon federal case law under the First Amendment. Nowhere in that analysis does *T&D Video* make any reference whatsoever to article 16 or otherwise indicate that distinct Massachusetts Constitutional considerations played any role in the Supreme Judicial Court's decision. Indeed, the only reference to article 16 in the entire decision is in its description of the plaintiff's claims. 423 Mass. at 578, 670 N.E.2d at 163.

Furthermore, like *A.F.M.*, *T&D Video* does not stand for the proposition for which it is cited by DHL. The Supreme Judicial Court did not, as DHL contends, create a new, heightened standard for determining whether a zoning restriction is designed to further a substantial government interest. (*See* Petition, p.6-7). Applying federal case law, the state court noted that a municipality may not rely upon "merely speculative factual grounds" and "[m]ere conclusions asserted after an ordinance's enactment regarding the secondary effects of adult entertainment." 423 Mass. at 581, 670 N.E.2d at 165 (quoting *Krueger v. Pensacola*, 759 F.2d 851, 855 (11th Cir. 1985). This language does not constitute, or even hint at, a stricter standard for reviewing adult entertainment zoning restrictions under article 16 than under the First Amendment.

Nowhere in *T&D Video* does the Massachusetts court purport to apply any standard other than the *Renton* analysis. While the Town agrees that *T&D Video* may have *mis*-applied that standard to the particular facts of that case, this simply does not create a novel and unsettled question of state constitutional law.

c. Other Article 16 Jurisprudence

DHL argues that it is unsettled whether Article 16 affords adult entertainment broader protection from zoning restrictions than the First Amendment. Repeated and established holdings of the Massachusetts Supreme Judicial Court belie that argument. Massachusetts' highest court has firmly established — and never disclaimed — the principle that article 16 is to be construed coextensively with the First Amendment, stating, "the criteria which have been established by the United States Supreme Court for judging claims arising under the First Amendment . . . *are equally appropriate to claims brought under the cognate provisions of the Massachusetts Constitution.*" *Opinion of the Justices to the House of Representatives*, 387 Mass. 1201, 1202, 440 N.E.2d 1159, 1160 (1982) (quoting *Colo v. Treasurer & Receiver General*, 378 Mass. 550, 558, 392 N.E.2d 1195, 1200 (1979)) (emphasis added). Therefore, certification in this instance would have been both futile and wasteful of the time and resources of the courts and the parties.

In an attempt to circumvent this established principle, DHL argues that three cases, "*Redgrave v. Boston Symphony Orchestra*, 855 F.2d 888 (1st Cir. 1988), *Commonwealth v. Sees*, 374 Mass. 532, 373 N.E.2d 1151 (1978), and *Cabaret Enterprises, Inc. v. ABCC*, 393 Mass. 13, 468 N.E.2d 612 (1975), indicate that article 16 provides greater protection for

adult entertainment than the First Amendment." (Petition, p.15). While these cases do establish a different application in article 16 cases where the Twenty-First Amendment is implicated, this difference in application is narrowly limited to the subject of regulating the service of alcohol in conjunction with adult entertainment.

Both *Sees* and *Cabaret* involved challenges to local and state legislation making it illegal to present nude dancing in liquor licensed establishments. In this context, both cases found that article 16 provided broader protection for nude dancing in nightclubs than the First Amendment, but only because, due to the Twenty-First Amendment, "federal courts must allow states 'broad powers . . . to regulate the sale of liquor [including the right to] ban nude dancing as part of [their] liquor license program,' " while Article 16 is subject to no such limitation. *Redgrave*, 855 F.2d at 918 n.4 (quoting *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975)) (Bownes, J., dissenting). This application is not pertinent and provided no support for certification here. Accordingly, it provides no basis for the grant of DHL's present petition.

2. Denial of plaintiff's request for certification is entirely consistent with decisions of this Court.

In arguing that the Court of Appeals erred in refusing to certify questions of state law to the Massachusetts Supreme Judicial Court, DHL asserts that the First Circuit's refusal to do so conflicts with this Court's decision in *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997).[3] DHL's assertion is incorrect. In *Arizonans*, this Court vacated a decision

3. DHL argues that the Court of Appeals "ignored the holding" in *Arizonans*, yet DHL did not cite *Arizonans* in any of its briefs to the District Court or Court of Appeals.

of the Court of Appeals for the Ninth Circuit, which had invalidated a state constitutional amendment designating English as the state's official language, primarily on the ground that the controversy there at issue had become moot. 520 U.S. at 74-75. The Court also indicated that the lower courts should have certified to the Arizona Supreme Court the question of how to interpret the challenged amendment. *Id.* at 75-80.

The instant case is readily distinguishable from *Arizonans*: here the meaning and application of the legislation subject to challenge is not in dispute. In *Arizonans* this Court professed that certification would have been proper to permit the state court to rule on the *meaning* of the subject amendment. 520 U.S. at 76 (rejecting the lower courts' characterization of the subject amendment as "plain" in meaning). The reason for this approach is that the proper construction of a challenged legislative provision is a necessary question antecedent to review of such a provision's constitutional validity. Therefore, where state legislation is subject to disparate constructions, a federal court should not adjudicate that legislation's validity under the United States Constitution without the benefit of the state courts' opinion of the meaning of such legislation. *See Arizonans*, 520 U.S. at 80.

The adult entertainment By-law and the 1996 zone here in issue, unlike the state constitutional provision at issue in *Arizonans*, are not novel or subject to multiple constructions, and DHL does not allege they are. DHL alleges only that these restrictions are unconstitutional under the First Amendment and its state constitutional analogue, article 16 of the Massachusetts Declaration of Rights. As note above, the Massachusetts Supreme Judicial Court has indicated, both affirmatively in *Opinion of the Justices*, 387 Mass. at 1202, 440 N.E.2d at 1160, and by its omission of any independent reference to article 16

in *T&D Video* and *A.F.M.*, that article 16 is to be construed as coextensive with the First Amendment. Clearly, then, the reasoning employed in *Arizonans* is not apposite in this instance, and the Court of Appeals properly rejected DHL's argument for certification.

Absent from DHL's petition is any mention of the standard commonly applied to determine whether to exercise jurisdiction over federal questions in cases involving analogous state and federal constitutional provisions, *Michigan v. Long*, 463 U.S. 1032 (1983). In *Long*, this Court was presented with an appeal from a state court decision, which rested upon both federal and state law grounds. In determining whether to exercise jurisdiction over the federal question, the Court expressed its concern to ensure: "[r]espect for the independence of state courts, as well as avoidance of rendering advisory opinions." *Id.* at 1040. In order to replace the previously "*ad hoc*" method of addressing these concerns, this Court adopted the so-called "plain statement" test:

> Accordingly, when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did *because it believed that federal law required it to do so* . . . "It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions. *But it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination*

> *by this Court of the validity under the federal constitution of state action.*" . . . [I]n determining, as we must, whether we have jurisdiction to review a case that is alleged to rest on adequate and independent state grounds, we merely assume that there are no such grounds when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law.

Long, 463 U.S. at 1040-42 (citations omitted) (emphasis added).

The test set forth in *Long* is directly applicable to the District Court's decision to address the federal question presented here, where DHL bases its certification argument upon the unfounded assertion that *A.F.M.* and *T&D Video* were decided upon independent state grounds under article 16 of the Massachusetts Declaration of Rights. As discussed above, both *A.F.M.* and *T&D Video* relied exclusively upon federal law and applied the federal standard established in *Renton*. More importantly, neither case contains a plain statement, or indeed any indication whatever, that article 16 provided a basis independent of the First Amendment for the holdings therein.

In sum, Massachusetts courts have had ample opportunity to review *Renton* and its progeny and to determine whether to forge a divergent body of case law to afford adult entertainment protections broader than those of the First Amendment. The state courts have declined to do so, however, choosing instead to construe article 16 coextensively with the First Amendment. This question is hardly novel, fourteen years after *Renton*. *Compare Arizonans*, 520 U.S. 43 (concerning newly-adopted

amendment to state constitution, which state courts had not had opportunity to construe). Absent a plain statement by the Supreme Judicial Court to the contrary, therefore, the state and federal constitutional protections of adult entertainment must be construed as coextensive. Accordingly, the Court of Appeals properly declined to certify this question to the state court, and DHL's Petition should be denied.

3. The state law questions would not be dispositive.

This Court should also reject DHL's certification argument because the state law questions would not obviate the need for adjudication of the federal questions, insofar as DHL would have to succeed in its *federal* claims to obtain an award of attorneys fees and costs, as requested in the Complaint.

Under the federal Civil Rights Act, 42 U.S.C. §§ 1983 and 1988(b), a plaintiff may be entitled to damages, attorneys fees and costs if it can prove the violation by a state actor of a federally-protected civil right. (App. 1a-2a). Thus, if DHL were successful on its First Amendment claims, it might recover attorneys fees and costs,[4] which, after such protracted litigation, are likely to be substantial.

In contrast, the Massachusetts Civil Rights Act, Mass. Gen. L. ch. 12, §§ 11H and 11I ("MCRA"), requires not only proof that a plaintiff's rights have been violated, but that they have been violated by means of "threats, intimidation or coercion." (App. 2a-3a). To violate the MCRA there must be, in addition to the deprivation itself, "something akin to duress which causes the victim to relinquish [his] rights." *Butler v. RMS Technologies, Inc.*, 741 F. Supp. 1008, 1011 (D. Mass. 1990); *see, e.g., Freeman v. Planning Bd. of West Boylston*, 419 Mass.

4. DHL waived its damages claims prior to trial.

548, 646 N.E.2d 139, *cert. denied*, 516 U.S. 931 (1995). A direct deprivation of a secured right will not violate the MCRA if it "lacks the quality of coercion." *Butler*, 741 F. Supp. at 1011.

In this instance, DHL has made no showing that the Town violated its rights through use of threats, intimidation or coercion. Indeed, it is undisputed that the Town has not even enforced its adult entertainment By-law against DHL, pending the outcome of this litigation. (Petitioner's App. 6a-7a). Absent such a showing, DHL can only recover under the federal Civil Rights Act and not under the MCRA. Therefore, even if the actual validity of the 1996 zone could be adjudicated by the state courts separately and independently of First Amendment considerations, DHL's claim for attorneys fees and costs could not, and adjudication of the federal questions was therefore necessary to address these claims.

B. The plaintiff's untimely requests for certification comprise an improper attempt to manipulate the federal courts' jurisdiction to insulate from review by the federal judiciary state court interpretations of federal constitutional provisions favorable to the plaintiff.

The Supreme Court and lower federal courts are vested with jurisdiction over cases arising under the United States Constitution. *See, e.g., Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); 28 U.S.C. § 1331. As demonstrated above, and notwithstanding plaintiff's belated attempt to recast this case under the state constitution, this litigation primarily concerns claims under the First Amendment and 42 U.S.C. § 1983.

In light of the belated nature of DHL's first requests for the District Court to remand or certify state law questions and

the timing of these requests immediately following adverse rulings by the District Court, it appears that DHL's true strategic motivation was to shift this case to a forum more favorable to its position. Likewise, by admitting that the Supreme Judicial Court's rulings in *T&D Video* and *A.F.M.* conflict with *Renton*, but arguing that this Court should assume those cases to have been decided under the state constitution, DHL is attempting to manipulate this Court's sensitivity to issues of federalism for the purpose of preserving from review by this Court potentially erroneous interpretations of the First Amendment by the state courts. This Court recently expressed its distaste for such behavior and its "interest in preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review." *City of Erie v. Pap's, A.M. TDBA "Kandyland"*, __ U.S. __, No. 98-1161, slip op., 2000 U.S. LEXIS 2347, *23 (March 29, 2000). This interest would be ill served by permitting DHL to seek review of its fundamentally federal claims in the state courts. Accordingly, the lower courts' exercise of discretion in declining certification is consistent with standards articulated by this Court, and *certiorari* should be denied on this additional basis.

II.

THE COURT OF APPEALS APPLIED THE *RENTON* STANDARD CONSISTENTLY WITH HOLDINGS OF THIS COURT AND OTHER CIRCUITS.

DHL urges this Court to grant the writ on the basis that "the Court of Appeals failed to properly apply the substantial governmental interest and reasonable opportunity to open and operate tests under *Renton v. Playtime Theatres, Inc.*" (Petition, p.24). As a preliminary matter, the Town notes that the alleged failure of a lower court to "properly apply" a correctly-stated

standard is not an appropriate subject for *certiorari*. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings *or the misapplication of a properly stated rule of law*") (emphasis added).

It is not disputed that the Court of Appeals correctly stated the applicable rules of law in this case. Specifically, the Court of Appeals referred to *Renton* and first considered the appropriate level of scrutiny to be applied to the Town's By-law. In making this determination, the Court of Appeals, in accordance with *Renton*, inquired as to whether the By-law was "aimed at combating the secondary effects of nude dancing rather than the content of the message expressed by nude dancing." (Petitioner's App. 15a-16a, 20a-21a). Likewise, the Court of Appeals applied the proper standard in determining the constitutional adequacy of the 1996 zone[5] by inquiring "whether Tyngsborough's ordinance allows reasonable alternative methods of communication." (Petitioner's App. 21a).

These are the exact standards established in *Renton*. *See* 475 U.S. at 46. DHL's dissatisfaction with the *result* of the Court of Appeals application of these standards to the particular facts of this case does not raise an appropriate subject for review by this Court on *certiorari*. For this reason alone, the Court should deny DHL's Petition.

In any event, as discussed in greater detail below, the Court of Appeals did not misapply the *Renton* standard. The decision

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5. The Court of Appeals held that the validity of the 1989 and 1994 zones was moot, in light of its determination that the 1996 zone is constitutional. DHL has not addressed this holding in its Petition and has, therefore, waived this issue. *See* Sup. Ct. R. 14(1)(a).

below does not conflict with *Renton*, with any other decisions of this Court or with decisions of other courts of appeal. As such, no basis for the grant of *certiorari* exists.

A. The Court of Appeals properly affirmed the District Court's determination that the By-law was designed to combat the adverse secondary effects commonly associated with adult entertainment.

DHL's sole argument in support of its position that the Court of Appeals erred in determining that the 1996 zone was designed to further the substantial governmental interest of combating adverse secondary effects associated with adult entertainment is that any amendment of the By-law required new evidence of such secondary effects. (*See* Petition, pp.26-29). DHL argues that the considerations prompting the Town's adoption of the 1994 zone could not justify the adoption of a new zone in 1996. It further argues that the Court of Appeals' rejection of this argument below "not only misconstrues the purpose of *Renton's* substantial government interest requirement but also conflicts with two recent cases." (Petition, p.27). This Court should deny the petition because the Court of Appeals' decision is in accord with the decisions of this Court and because the cases upon which DHL relies are not apposite.

1. The Court of Appeals' decision does not conflict with the decisions of any other Circuit.

DHL relies upon two cases for its proposition that a conflict between the First Circuit's decision below and decisions of other circuits warrants further review by this Court. Both cases are readily distinguishable, in that each involved new enactments by the defendant-municipalities, which were substantially more

restrictive than the ordinances they replaced. *See J&B Entertainment, Inc. v. City of Jackson, Miss.*, 152 F.3d 362, 374 (5th Cir. 1998) (replacement of simple zoning restrictions on adult entertainment with complete *ban* on public nudity) and *N.W. Enterprises, Inc. v. City of Houston*, 27 F. Supp.2d 754, 771-72 (S.D. Tex. 1998)[6] (where new ordinance "increases locational restrictions on all sexually oriented businesses, expands the reach of signage restrictions, and adds new regulations affecting individuals working in sexually oriented businesses" and requires applicants for adult entertainment licenses to "publish newspaper notices warning the public of their applications").

In contrast to the cases cited by DHL, the Town did not increase its restrictions on adult entertainment, or otherwise substantially alter the nature of those restrictions, when it adopted the 1996 zone. To the contrary, the 1996 zone *increases* the number of lots and the amount of acreage available for adult uses and was actually adopted "for the purpose of making [the By-law] more likely to overcome constitutional challenge." (Petititoner's App. 10a). Certainly, a Town need not justify by new references to adverse secondary effects an attempt to provide *greater* opportunity for expression.

N.W. Enterprises is distinguishable for the additional reason that the district court's decision in that case emphasized the lengthy delay between the two enactments involved. Specifically, the city attempted to justify new restrictions adopted in 1996 by reference to evidence that it considered

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6. As a threshold matter, any purported conflict with a *district court* decision such as *N.W. Enterprises* does not warrant review by this Court. *See* Sup. Ct. R. 10(a) (referring to "conflict with the decision of another United States *court of appeals*") (emphasis added).

secondary effects in adopting a prior ordinance thirteen years earlier, in 1983. 27 F. Supp.2d at 804. In rejecting the city's contention in this regard, the district court distinguished a Fifth Circuit Court of Appeals case[7] that permitted the city to rely on the record of the 1983 ordinance to justify a 1986 amendment, "which was enacted *a mere three years* after the 1983 legislative record was compiled." 27 F. Supp.2d at 804 (emphasis added). Certainly, this holding is consistent with the First Circuit's holding in this case that, adopting the 1996 zone, the Town could rely upon considerations of secondary effects that prompted adoption of the 1994 zone just *two* years prior.

2. The Court of Appeals' decision in this case is consistent with the holdings of this Court and other circuits.

As demonstrated above, DHL's argument that the First Circuit's decision below is inconsistent with case law from other circuits is without merit. In addition, the petition should be denied because the First Circuit's holding that the 1996 zone was designed to address concerns regarding adverse secondary effects of adult entertainment comports with established precedent of this Court and other Circuits.

This Court recently reaffirmed the principle that municipalities may rely upon their experiences and knowledge regarding the well known effects of adult entertainment when regulating such entertainment. *See City of Erie v. Pap's*, *supra*, __ U.S. __, No. 98-1161, 2000 U.S. Lexis 2347, *39-40. In this instance, both lower courts found that the Town's regulation of adult entertainment was prompted by its experience that

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7. *SDJ, Inc. v. City of Houston*, 837 F.2d 1268 (5th Cir. 1988), *cert. denied sub nom. M.E.F. Enterprises, Inc. v. City of Houston*, 489 U.S. 1052 (1989).

establishments offering such entertainment in Town generate more police activity than do other liquor licensed establishments and by stated concerns of Town citizens regarding the increase in crime that might be caused by such establishments. (Petitioner's App. 17a-18a, 40a). These considerations are no less relevant to the Town's adoption of the 1996 zone than they were to the adoption of the 1994 zone.

Further, the Fifth Circuit, the only circuit identified by DHL as being at odds with the First Circuit in this regard (*see* Petition, p. 27-29), has itself held that a municipality need not demonstrate that an amendment to an adult entertainment regulation was prompted by new considerations regarding secondary effects, at least where, as here, the amendment is not too remote in time from the previous legislation, and where the amendment is not substantially more restrictive. *See SDJ, supra,* 837 F.2d at 1273 ("Although the 1986 supplemental report relates no empirical evidence of the effects of topless bars, that report incorporates the 1982 report, which does refer to topless bars"); *see also DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 410-11 (3rd Cir. 1997) (rejecting as irrelevant allegation "that much of the evidence of crime and health effects was developed after the enactment of the [challenged] amendment to the ordinance, and therefore is not evidence of the City Council's intent"); *Phillips v. Borough of Keyport*, 107 F.3d 164, 178 (3rd Cir. 1997) (same).

As demonstrated above, the First Circuit's decision below is in accord with the decisions of this Court and other circuits. Therefore, DHL's Petition should be denied.

B. The Court of Appeals properly affirmed the District Court's determination that the 1996 zone provides for a reasonable opportunity for adult entertainment establishments to open and operate.

DHL makes two arguments in support of its position that the Court of Appeals improperly held that the 1996 zone provides for reasonable alternative avenues for the presentation of adult entertainment: (1) that the Court of Appeals improperly determined the availability of land within the 1996 zone as of the date of trial; and (2) that the area within the zone is too small, as a matter of law, to satisfy *Renton*. Neither argument is supported by a reading of *Renton* or other decisions of this Court and other circuits.

1. The Court of Appeals' holding that land within the 1996 zone is potentially available comports with *Renton* and decisions of other Circuits.

DHL is wrong in its assertion that a municipality is required to inquire as to the availability of land within a proposed adult entertainment zone, prior to enacting such a zone.[8] (*See* Petition, p.24-25). This Court explicitly rejected this notion in *Renton*, when it stated that adult business "must fend for themselves in the real estate market, on an equal footing with other prospective

8. It is noteworthy that Walter Erikson, the owner of the land within the 1996 zone, testified "that if presented with the right price he . . . would sell to an adult entertainment establishment." (Plaintiff's App., 46a). It is undisputed that DHL never made a single offer to purchase or lease land within the 1996 zone, (A. 641), and it cannot argue that Mr. Erikson would not have entertained a reasonable offer from DHL had one been tendered. Therefore, any argument that land within the 1996 zone was not reasonably available prior to trial is wholly speculative and should not be credited by this Court.

purchasers." 475 U.S. at 54. *See also Woodall v. City of El Paso*, 49 F.3d 1120, 1125 (5th Cir. 1995) ("The Adult Businesses claimed that some sites were unavailable because the owner of the site probably would not rent or sell to an adult business, or because the building was currently occupied or leased, neither of which is of any obvious concern under *Renton*"). The only federal decision to suggest that actual availability is even a consideration stopped well short of endorsing the position urged by DHL. *See Topanga Press v. Los Angeles*, 989 F.2d 1524, 1531 (9th Cir. 1993) (property "is not 'potentially' available when it is unreasonable to believe that it would *ever* become available to *[any] commercial enterprise*") (emphasis added).

In reviewing the reasonableness of the 1996 zone, the Court of Appeals applied the same standard established in *Renton* and thereafter applied by all federal courts, to wit, whether the zone provides sites that are " 'potentially' as opposed to 'actually' available" for adult entertainment. *Renton*, 475 U.S. at 43. (*See* Petitioner's App. 23a). As DHL has failed to identify any inconsistency between the First Circuit's decision below and the decisions of this Court and other circuits, the petition is without merit, and the writ should be denied.

2. The Court of Appeals' fact-based finding that the 1996 zone provides for reasonable alternative avenues of communication for adult entertainment is consistent with the decisions of this Court and other Circuits.

DHL argues that "no court has upheld" an adult zone as small as that comprising the 1996 zone. (Petition, p.25). As the Court of Appeals noted, "D.H.L. misses the mark, however, in emphasizing this single factor." (Petitioner's App. 22a). In emphasizing this factor, to the exclusion of other relevant

considerations, DHL completely misconstrues applicable case law. *See North Avenue Novelties, Inc. v. City of Chicago*, 88 F.3d 441, 445 (7th Cir. 1996) ("acreage, standing alone, is largely irrelevant"); *Lakeland Lounge v. City of Jackson*, 973 F.2d 1255, 1260 (5th Cir. 1992) ("There is no requirement in *Renton*, *Woodall*, or elsewhere that a specific proportion of a municipality be open for adult businesses or that a certain number of lots be available).

The Court of Appeals acted in accord with other federal courts when it reviewed the adequacy of the 1996 zone in light of the character of the Town and the demand for sites to operate adult businesses therein. In contrast to the large-city defendants in the cases cited by DHL (Petition, pp.25-26 n.19), the Town is small, rural in character and without a large, central, commercial area. (*See* Petitioner's App. 23a). More importantly, "as a matter of arithmetic," *Woodall*, 49 F.3d at 1127; *Lakeland Lounge*, 973 F.2d at 1260, the five available lots within the 1996 zone more than satisfy any demand that DHL might have to relocate. It is also significant that the Town is permitting another adult entertainment establishment, which predates the By-law, to operate outside of the 1996 zone.

In upholding the 1996 zone based upon the size and character of the Town and the fact that the number of available sites exceeds potential demand therefor, the First Circuit followed the decisions of other circuits, which have found these to be determinative factors, and conformed with *Renton*'s "reasonableness" standard, which must be viewed in light of such factors. For this final reason, the petition should be denied.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

RICHARD BOWEN
Counsel of Record
JONATHAN M. SILVERSTEIN
KOPELMAN AND PAIGE, P.C.
Attorneys for Respondents
31 St. James Avenue
Boston, MA 02116
(617) 556-0007